Loong Koi showed no interest in proceeding with the agreement. Therefore the exercise of the option was subject to a condition that PW1's client had no interest to pursue the matter any further. Looking at the documents in the Agreed Bundle, I am more inclined to the conclusion that the option was in fact revoked after the letter from PW1 to the First defendant dated December 18, 1973 (9 in Agreed Bundle) wherein it was stated that PW1's client now wished to complete the agreement dated October 16, 1972 to purchase the land. It was in response to this letter that letters in 10, 12 and 13 in Agreed Bundle were written by First defendant to PW1.

The sole purpose of giving a specified time limit in an option is to indicate to the offeree that the offer will lapse automatically if it is not accepted before the expiry of the time limit. In this case the option was an open dated one, that is to say there was no time limit but (as admitted by PW1 himself) exercisable only after Loong Koi showed no more interest in the land. In my view it was also quite probable that as on the date PW1 and first defendant met when the option was executed it appeared to PW1 and was also understood by the first defendant upon representation by PW1 that it was quite possible that Loong Koi would give up the agreement dated October 16, 1972. However as the documents in the Agreed Bundle show this was not as easy as expected for reasons best known only to Loong Koi and PW1. But the important thing is, according to the letter dated December 18, 1973 Loong Koi was, for all intents and purposes (at least as far as must have appeared to the first defendant) determined to proceed with the agreement. Therefore as on December 18, 1973 it was already in the knowledge of PW1 that the condition under which he could exercise the option could no longer come about. Upon receipt of this letter from PW1 the First defendant replied in his letter as in 10 in the Agreed Bundle. Therefore it was at this point in my view that the obligation of the defendants in the option was discharged and the option therefore came to an end. To construe that the option should remain exercisable even after this point would be to extend the option to an unreasonable time.

Therefore even if for one moment that it could be assumed that there was consideration the option had been revoked well before the purported intention to exercise the option as notified to the first defendant in PW1's letter to the defendants dated February 11, 1974 (14 in Agreed Bundle).

On the above considerations it is my view that the plaintiff company must fail in their present action. Basing also on the above considerations it is no longer necessary to consider the other question whether the express condition in the title of the land would by its nature preclude specific performance.

The plaintiffs' claim is dismissed with costs. I also order that the Private Caveat 842/74 on the land held under and comprised in Surat Hakmilek Semantara No. H.S. (D) KA. 691/73 for Lot No. 66133 in the Mukim of Ulu Kinta be removed forthwith.

Claim dismissed.

Solicitors: *H. R. Sankey & Co.; S. A. Lingam & Co.*

F. HOUSING SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Mohamed Azmi J.) February 14, 1976]
[Kuala Lumpur — Originating Motion 3 of 1973]

Income Tax — Land belonging to land development company acquired by government — Whether difference between the collector's award and purchase price assessable to tax — Income Tax Act, 1967, s. 4(a).

In this case land belonging to the appellant company had been acquired by the government. Compensation in the sum of $1,407,139.69 was paid to the appellant company and tax was assessed on the difference between this and the purchase price of the land. The question for determination was whether the difference between the compensation awarded and the purchase price was assessable to income tax under section 4(a) of the Income Tax Act, 1967.

Held: on the facts of the present case, the isolated transaction, although it concerned compulsory acquisition, should lawfully be regarded as a trading transaction and therefore the difference between the acquisition award and the purchase price and cost of the land was income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967 and liable to tax.

Cases referred to:—

(1) *Rellim Ltd.* v. *Vise* 32 T.C. 254 at p. 258
(2) *Hudson's Bay Co. Ltd.* v. *Stevens* 5 T.C. 424.
(3) *Liquidator, Paramount Ltd.* v. *Comptroller General of Inland Revenue* (1970) 2 M.L.J. 193.
(4) *Eames* v. *Stepwell Properties Ltd.* 43 T.C. 678 at p. 692.
(5) *Glenboig Union Fireclay Co. Ltd.* v. *Commissioners of Inland Revenue* 12 T.C. 427 at p. 448.
(6) *Californian Oil Products Limited (in liquidation)* v. *Federal Commissioner of Taxation* 52 C.L.R. 28.
(7) *London and Thomas Haven Oil Wharves Ltd.* v. *Attwool* 43 T.C. 491.
(8) *Commissioners of Inland Revenue* v. *Newcastle Breweries Ltd.* 12 T.C. 927.
(9) *Imperial Tobacco Co. Ltd.* v. *Kelly* 25 T.C. 292
(10) *London Investment & Mortgage Co. Ltd.* v. *Worthington* 38 T.C. 86.
(11) *Johnson* v. *W.S. Try Ltd.* 27 T.C. 167.
(12) *Balgownie Land Trust Ltd.* v. *Commissioners of Inland Revenue* 14 T.C. 684 at p. 691.
(13) *Leeming* v. *Jones* 15 T.C. 333.
(14) *E.* v. *Comptroller-General of Inland Revenue* [1970] 2 M.L.J. 117 at p. 123.

CASE STATED.

S. Woodhull for the appellant.

Baharuddin bin Sulaiman (Federal Counsel) for the respondent.

Mohamed Azmi J.: This is an appeal by way of Case Stated against the decision of the Special Commissioners of Income Tax that the sum of $298,837 being the difference between the purchase price and cost paid by the appellants of approximately 93.8 acres of rubber land and the sum awarded by the Collector of Land Revenue, Klang, under the Land Acquisition Act, was chargeable to tax under section 4(a) of the Income Tax Act, 1967. The appellant company, which was registered on March 19, 1965, purchased the land by agreement in September the same year for a sum of $1,104,832 exclusive of costs. The Collector's award was made on March 12, 1968 and compensation in the sum of $1,407,139.69 was paid to the appellant company as market value of the land at the relevant date of acquisition. The tax assessed on the difference amounted to $134,376.65.

The brief facts of the case as found by the Special Commissioners are as follows. By agreement dated October 20, 1964, Y. K. N. and four others purchased the land in question from Seaport (Selangor) Rubber Estate Limited for the sum of $1,207,500. The land was purchased with the sole object of transferring same to the appellant company yet to be formed, for purposes of conducting a housing development. It formed a natural extension to an existing housing estate known as University Gardens; and, as such, it had potentiality as building land. In line with their original objective, Y. K. N. and his four colleagues incorporated and registered the appellant company on March 16, 1965 with an authorised capital of $5,000,000 divided into 500 shares of $10,000 each, with power from time to time to increase or reduce its capital. They became the five subscribers to the Memorandum and Articles of Association of the appellant company, and they were also the first directors. The objects for which the appellant company was established are as set out in clause 3 of the Memorandum of Association. (See Exhibit A9). On June 12, 1965, the Commissioner for Lands Selangor notified in the Selangor Government *Gazette* that the property was likely to be needed as a site for low-cost housing. (See Exhibit A2 page 16). In spite of the said notice — which, according to the admission of Y. K. N. at the hearing before the Special Commissioners, was known to him and his four colleagues — an agreement was entered into on September 18, 1965 whereby the land in question was transferred by assignment to the appellant company. Upon the said transfer, the appellant company took various steps in 1966 to develop the said land by submitting a draft layout plan and applying for sub-division. These steps were taken despite the fact that the directors of the appellant company were well aware of the fact that a declaration of intended acquisition of the land under section 8 of the Land Acquisition Act, 1960 had been published in the Government of Selangor *Gazette* on December 23, 1965. (See Exhibit A2 page 17). The explanation given by the appellant company for their action was that they were hoping that the Government might decide not to acquire the property. As stated earlier on, the appellant company was eventually awarded a sum of $1,407,139.69 by the Collector as compensation. At an extraordinary meeting of the appellant company held on November 5, 1969, it was resolved that the company be wound up.

Although Mr. Woodhull had submitted on behalf of the appellants that there are four grounds of appeal, it is not in dispute that the only question for determination in this case is whether the sum of $298,837 being the difference between the Collector's award and the purchase price and costs is assessable to income tax under section 4(a) of the Income Tax Act, 1967. This subsection provides:

"Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of —

(a) gains or profits from a business, for whatever period of time carried on."

It is therefore clear that for the above sum to be chargeable to tax, it must be the appellant company's income in respect of gains or profits from a business. The word "business" is defined under section 2 as including "trade" and "adventure or concern in the nature of trade". As submitted by counsel for the respondent, the inclusion of the phrase "adventure or concern in the nature of trade" in the definition has widened the original scope of the meaning of the word "business" under section 10(a) of the Income Tax Ordinance, 1947.

The four grounds of appeal advanced in this case are: —

(i) that the appellants are a land developing company and not a land dealing company;

(ii) that the payment as compensation for compulsory acquisition of undeveloped land is capital receipt and not income;

(iii) that the receipt of the company was an isolated transaction not arising out of its business activities;

(iv) that the receipt is not specifically charged to tax under Income Tax Act, 1967.

Before dealing with these grounds of appeal, I am of the view that it is necessary first to decide whether the land in question is stock-in-trade or capital of the appellant company. The distinction between the two is, of course, important for tax purposes because, if the company were to make profit from the sale of its capital, then the profit is not taxable, but on the other hand, if the company were to make profit from the sale of its stock-in-trade, then the profit is taxable as trade profits under section 4(a) of the income tax legislation. Whether the land in question is the appellants' capital or stock-in-trade is, of course, purely a question of fact. In this case, the Special Commissioners have found as a fact that it is stock-in-trade and not capital. Unless there is no evidence to support this finding or unless the Special Commissioners can be shown to have erred in their conclusion on primary facts, I do not think this court should interfere with their finding. This is so even if this court were to arrive at a different conclusion. (See judgment of Wynn-Parry J. in *Rellim, Ltd.* v. *Vise*[1] and *Halsbury's* Laws of England, Third Edition, Volume 20, page 697).

On the first ground of appeal, it is contended on behalf of the appellants that the company is a land developing company and not a land dealing company. At the enquiry before the Collector and as well as at the hearing before the Special Commissioners, the appellants have all along took the stand that they were a land developing company. But, it is now argued before me that there should be a distinction between a land dealing company and a land developing company. It is submitted that the stock-in-trade argument is valid only in respect of land dealing company and not land developing company. With respect, I cannot see the relevancy of this distinction in the present case. Further, the case of *Hudson's Bay Co. Ltd.* v. *Stevens*[2] cited by learned counsel for the appellants where it was held that the proceeds of sale of territories granted to the company were not profits or gains derived by them from carrying on a trade of dealing in land and were not, therefore, assessable to income tax is of no help in the present case, since the facts of that case are entirely distin-

guishable from the case under consideration. Before the Special Commissioners, the question of land dealing company was never seriously pursued, and nor can I find anywhere in the Case Stated that the Special Commissioners have made a finding of fact or have made any inference from the fact that the appellants were a land dealing company. In my view, their finding that the land in question was the appellants' stock-in-trade is supported by the evidence. As stated earlier on, we are here dealing with a limited company and not with a private individual. As in the case of *Liquidator, Paramount Ltd.* v. *Comptroller-General of Inland Revenue,*[3] the land in the present case was bought for development and not as an investment. As such, the land is stock-in-trade and not capital. Further, from clause 3 of the Memorandum of Association, it is expressly stated that the objects of the appellant company include the power to develop land and to deal in land, and it is clearly admitted that the appellants are essentially a developing company. As such, even if the Special Commissioners had made the alleged inference that the appellant company is a land dealing company, such finding is, in my view, not wrong in law or fact. The fact that the appellant company acquired the land in question with the knowledge that it is to be compulsorily acquired is sufficient to show that they acquired it for the purpose of reselling the property at a profit without developing it. As stated by Buckley J. in *Eames* v. *Stepnell Properties Ltd.*[4]:

"But to buy property which is virtually sold . . . it seems to me that the only conclusion that one can reasonably arrive at is that the company acquired this property with a view to its realisation and with the commercial expectation, although not perhaps the absolute assurance, that upon such realisation the company would make a profit."

The first ground of appeal, therefore, fails.

On the second issue, it is contended on behalf of the appellants that the payment as compensation for compulsory acquisition of undeveloped land was capital receipt and not income and, as such, not taxable. There is no local authority cited either for or against this proposition. It is submitted that the land in question was the sole asset of the appellant company and constituted its profits yielding subject and by the realisation, *i.e.* compulsory acquisition, the property yielding subject was destroyed. In short, it is argued that the effect of the Land Acquisition Act, 1960 was to have on the applicant company's asset, *i.e.* the land, "struck with sterility and rendered permanently incapable of profitable employment" — to use the words of the Lord President in the House of Lords case of *The Glenboig Union Fireclay Co. Ltd.* v. *The Commissioners of Inland Revenue.*[5] Although *Glenboig's* case was applied in the Australian case of *Californian Oil Products Limited (In Liquidation)* v. *The Federal Commissioner of Taxation,*[6] I am of the view both cases are distinguishable on the facts with the present appeal. Apart from the fact that in both cases the taxpayers were not land developing or land dealing companies, the income to be taxed was not the difference between an acquisition award and the purchase price and cost paid by them for any asset. In *Glenboig's* case where the appellant company carried on business as manufacturers of fireclay goods and as merchants of raw fireclay, the compensation was paid to the company for part of the fireclay to be left unworked, and, as such, the House of Lords held that the amount received for compensation in respect of the fireclay left unworked was not profit earned in the course of the company's trade but was a capital receipt, being a payment made for the sterilization of a capital asset. Whereas in the present case, the facts are entirely different. The appellant company bought the land for development in full knowledge of the fact that the property was to be acquired by the Government, and, by taking various steps to develop the land, they were successful in convincing the Collector of Land Revenue that the undeveloped land had immediate potential value as building land and that its market value at the relevant date of acquisition was higher than the purchase price — thereby acquiring for the company an income of $298,837 being the difference between the acquisition award and the purchase price. On these facts, I hold that the compensation should be treated as income and, therefore, taxable as gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967. I find support for this finding on the authority of *London & Thames Haven Oil Wharves Ltd.* v. *Attwooll*[7] where it was held that even compensation is to be treated as income, and also in the case of *The Commissioners of Inland Revenue* v. *Newcastle Breweries, Ltd.*[8] where it was held by the House of Lords that profits made are taxable despite the fact that they were compensation paid as a result of requisitioning about a third of the stock of rum owned by the taxpayer. (See also *Imperial Tobacco Co. Ltd.* v. *Kelly;*[9] *London Investment & Mortgage Co. Ltd.* v. *Worthington;*[10] and *Johnson* v. *W.S. Try, Ltd.,*[11] although in the last case, the judgment is a review of the Ribbon Development Act, 1935). Further, if my conclusion is correct that the land in question is the stock-in-trade and not the capital of the appellant company, the fact that the land had been sold to Government by compulsory acquisition instead of being sold voluntarily would not, in my view, change the character of the asset from stock-in-trade to capital.

On the third ground, it is submitted that the receipt of the appellant company was an isolated transaction not arising out of its business activities. The law on isolated transaction is quite clear. Lord Clyde, the Lord President, in *Balgownie Land Trust, Ltd.* v. *The Commissioners of Inland Revenue*[12] had succinctly put it thus:

"A single plunge may be enough provided it is shown to the satisfaction of the court that the plunge is made in the waters of trade; but the sale of a piece of property — if that is all that is involved in the plunge — may easily fall short of anything in the nature of trade. Transactions of sale are characteristic of trade, but they are not necessarily distinctive of it; *much depends on the circumstances.*" (The italics are mine).

Thus, depending on the circumstances of each case, even a single transaction may constitute business or trade. As stated earlier on in my judgment, the effect of the inclusion of the phrase "adventure or concern in the nature of trade" in the definition of the word "business" in section 2 of the Income Tax Act, 1967 has widened the original scope of the meaning of the word "business" under section 10(a) of the Income

Tax Ordinance, 1947. The tests which must be applied in ascertaining whether or not a particular transaction constitutes "adventure or concern in the nature of trade" have been approved in *Leeming* v. *Jones*.[13] The four tests have been set out by Gill F.J. (as he then was) in the case of *E.* v. *Comptroller-General of Inland Revenue*[14] as follows: —

(i) the existence of an organisation;

(ii) activities which lead to the maturing of the asset to be sold;

(iii) the existence of special skill, opportunities in connection with the article dealt with;

(iv) the fact that the nature of the asset itself should lend itself to commercial transactions.

The existence of any one of the above is sufficient to establish the existence of an adventure in the nature of trade. In the present case, there is ample evidence that there was in existence an housing estate organisation in the form of a limited company. There is also evidence to show that the appellant company had special skill and opportunities in connection with the said property in the sense that the land in question was ideal for housing development and formed a natural extension to an existing housing estate known as University Gardens. I would, therefore, agree with the submission of learned counsel for the respondent that the fact that the compulsory purchase is an isolated transaction does not really matter since there is sufficient evidence that the transaction is a trading transaction or best indicia of trade. As stated earlier on, the appellant company knew fully well that the land in question was to be acquired by the Government even before they bought it. The five vendors, who ultimately became the first directors of the appellant company, must have known that, if they did not sell the land to the company, their individual task of convincing the collector that the rubber land was ripe for immediate development and therefore should attract much higher market value than the purchase price would be more difficult. On the facts of the present case, I am therefore of the view that this isolated transaction, although it concerns compulsory acquisition, should lawfully be regarded as a trading transaction; and, as such, I hold that the difference between the acquisition award and the purchase price and cost of the land is income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967.

I do not think it is necessary for me to deal at length with the fourth ground of appeal. There is no merit in the submission that the receipt obtained by the appellant company is not specifically charged to tax under the income tax legislation. It seems to me abundantly clear from the facts of the present case that the receipt obtained by the appellant falls squarely within the ambit of section 4(a) of the Income Tax Act, 1967.

In the event, I dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Shearn Delamore & Co.*

PUBLIC PROSECUTOR v. TEH AH CHENG

[A.Cr.J. (Abdoolcader J.) February 25, 1976]
[Ipoh — Criminal Appeal No. 91 of 1975]

Criminal Law and Procedure — Sentence — Appeal against — Age of accused — Firearms cases — Principles of sentencing with regard to Firearms cases — Criminal Procedure Code (F.M.S. Cap. 6), s. 294 — Arms Act, 1960, s. 9(a).

Firearms — Possession — Principles of sentencing — Age — Arms Act, 1960, s. 9(a).

This was an appeal against the order made in the Special Sessions Court binding over the respondent for a period of 2 years in one surety in the sum of $2000. The respondent had pleaded guilty of 2 charges of unlawful possession of a Stirling .25 automatic pistol and 6 rounds of .32 ammunition respectively, being offences punishable under section 9(a) of the Arms Act, 1960. The Special President by way of sentence applied the provisions of section 294 of the Criminal Procedure Code, and instead of sentencing him at once to any punishment, ordered that the respondent be bound over.

Held, allowing the appeal: (1) in sentencing generally the public interest must necessarily be one of the prime considerations, and more particularly in offences involving the unlawful use or possession of firearms the public interest should never be relegated to the background and must of necessity assume the foremost importance;

(2) of the several concepts relevant to sentencing, deterrence and prevention assume positions in the forefront in relation to offences of this nature;

(3) if a person is not too young to have in his possession and to handle firearms and does so unlawfully then he is certainly not too young to suffer the penalties therefor prescribed by law;

(4) the order made by the Special President should be set aside, and the respondent sentenced to three years imprisonment on each charge, the sentences to run concurrently.

Case referred to:—

(1) *Reg.* v. *J.H. Sargeant* (1975) 60 Cr. App. R. 74, 77, 78.

CRIMINAL APPEAL.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the appellant.

Paramjit Singh for the respondent.

Abdoolcader J. (delivering oral judgment): The Public Prosecutor appeals against the order made in this case in the Special Sessions Court at Ipoh on July 7, 1975, in respect of the respondent who pleaded guilty to two charges of unlawful possession of a Stirling .25 automatic pistol and 6 rounds of .32 ammunition respectively being offences punishable under section 9(a) of the Arms Act, 1960 when the Special President by way of sentence applied the provisions of section 294 of the Criminal Procedure Code and, instead of sentencing him at once to any punishment, ordered that he be bound over in respect of each of the two charges for a period of two years in one surety in the sum of $2,000. The respondent's mother was directed to stand surety although the probation officer in his report, for some strange reason best known to himself, specifically advanced the suggestion that the respondent's mother should not be a surety and that the respondent should be released on his own recognizance and cautioned.

The charge against the respondent in respect of his unlawful possession of the automatic pistol was initially framed under section 8 of the Firearms (Increased Penalties) Act, 1971 which of course carries a much more severe penalty. He claimed trial to that and the other charge in respect of the ammunition